(13)

No. 03-358

Supreme Court, U.S.
FILED
MAR 11 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

United States Department of Transportation,
Petitioner,

v.

Public Citizen, *et al.*
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF AMICI CURIAE DEFENDERS OF WILDLIFE, ENVIRONMENTAL DEFENSE, AND SIERRA CLUB IN SUPPORT OF RESPONDENTS

Kara Gillon
Defenders of Wildlife
824 Gold SW
Albuquerque, NM 87102

Janea Ashanti Scott
Environmental Defense
257 Park Avenue South
17th Floor
New York, NY 10010

Pamela S. Karlan
(Counsel of Record)
Deborah A. Sivas
559 Nathan Abbott Way
Stanford, CA 94305
(650) 725-4851

Sanjay Narayan
Sierra Club Environmental
Law Program
85 Second St., Second Floor
San Francisco, CA 94105

March 11, 2004

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

BEST AVAILABLE COPY

TABLE OF CONTENTS

TABLE OF CONTENTS i
TABLE OF AUTHORITIES iii
STATEMENT OF INTERESTS OF AMICI CURIAE 1
SUMMARY OF ARGUMENT 2
ARGUMENT 5
I. NEPA IS THE NATION'S BEDROCK ENVIRONMENTAL LAW AND APPLIES TO ALL MAJOR FEDERAL AGENCY ACTIONS 5
A. Congress Intended NEPA to Play a Central Role in Governmental Decisionmaking 6
B. NEPA's Objectives are Achieved Through Full Consideration and Disclosure of the Environmental Impacts of Federal Agency Action 8
II. NEPA REQUIRED THE FMCSA TO PREPARE AN EIS CONSIDERING THE ENVIRONMENTAL EFFECTS ATTRIBUTABLE TO PERMITTING INCREASED MEXICAN CARRIER TRAFFIC BEYOND THE BORDER ZONE 10
A. The FMCSA's EA Provided No Basis on Which to Issue a FONSI 11
1. An Increase in Mexico-Domiciled Truck Emissions Outside the Border Zone Is One Effect of the FMCSA's Actions 11
2. The EA Failed to Analyze Whether Mexican Carrier Emissions Outside the Border Zone Will Have a "Significant" Impact on the Environment 13
B. The Government's Argument Rests on an Unsupportable Notion of Causation 15
1. The FMCSA's Actions Are a Legal Cause of Mexican Carriers Operating Outside the Border Zone 15
2. The Order Lifting the Moratorium Did Not Excuse the FMCSA from Its Obligations Under NEPA 17

III. REQUIRING THE FMCSA TO PREPARE AN EIS SERVES THE IMPORTANT PURPOSES UNDERLYING NEPA 18
A. The EIS Would Enable the FMCSA to Choose Among Alternative Safety Regulations 19
1. The FMCSA's Mandate Incorporates Environmental Issues 19
2. The FMCSA Has Discretion to Choose Environmentally Protective Alternatives When Issuing Regulations 21
B. The EIS Would Provide Important Information to the Public, to Congress, and to the President 23
C. The EIS Would Assist States in Meeting Their Obligations Under the Clean Air Act 24
IV. THE FMCSA'S FAILURE TO PERFORM A CONFORMITY REVIEW VIOLATED THE CLEAN AIR ACT 26
CONCLUSION 28

TABLE OF AUTHORITIES

Cases

Alaska v. EPA, 124 S. Ct. 983 (2004) 2
Andrus v. Sierra Club, 442 U.S. 347 (1979) 6, 8
Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87 (1983) 16, 23
Calvert Cliffs' Coordinating Committee, Inc. v. Atomic Energy Commission, 449 F.2d 1109 (CADC 1971) 6, 23
Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190 (CADC 1991) 21
City of Chicago v. Environmental Defense Fund, 511 U.S. 328 (1994) 2
Comm. for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 783 (CADC 1971) 24
Dubois v. United States Dep't of Agric., 102 F.3d 1273 (CA1 1996) 23
Grand Canyon Trust v. Fed. Aviation Admin., 290 F.3d 339 (CADC 2002) 23
Marsh v. Oregon Natural Resources Council, 490 U.S. 360 (1989) 9, 11, 16, 24
Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766 (1983) 15, 16
Natural Resources Defense Council, Inc. v. Hodel, 865 F.2d 288 (CADC 1988) 23, 24
Pacific Legal Foundation v. Andrus, 657 F.2d 829 (CA6 1981) 8
Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989) ..... passim
Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001) 2
Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978) 2
Whitman v. American Trucking Associations, 531 U.S. 457 (2001) 2

Statutes

5 U.S.C. 706(1) 1
5 U.S.C. 706(2) 1
19 U.S.C 3312(a)(2)(A) 7, 18
19 U.S.C. 3312 ..... 7, 18, 27
42 U.S.C. 4321 ..... 1, 3, 5
42 U.S.C. 4332 ..... passim
42 U.S.C. 4335 ..... 8, 20
42 U.S.C. 7401 3
42 U.S.C. 7407 25
42 U.S.C. 7407(a) 26
42 U.S.C. 7410(a) 4
42 U.S.C. 7506 ..... 4, 26
42 U.S.C. 7506(c)(1) 4
42 U.S.C. 7509 26
42 U.S.C. 7510 26
42 U.S.C. 7521(b)(1)(C) 14
49 U.S.C. 112 22
49 U.S.C. 113(f) 20
49 U.S.C. 13902(a)(1) 21
49 U.S.C. 3100 20
49 U.S.C. 31139(c)(1) 20
49 U.S.C. 5101 20
49 U.S.C. 5501(a) 21
Pub. L. 107-87, § 350, 115 Stat. 833 (2002) ..... passim
Pub. L. No. 108-199, Div. F, Tit. I, § 130 (2004) (available on Westlaw at 2004 HR 2673) 12

Regulations

40 C.F.R. 86.004-11 14
40 C.F.R. 86.007-11 14
40 C.F.R. 93.150-.160 26
40 C.F.R. 93.152 ..... 4, 26, 27
40 C.F.R. 93.153(b) 26
40 C.F.R. 93.154 26
49 C.F.R. 171-180 ..... 20, 22
49 C.F.R. 385.101-.117 28

49 C.F.R. 385.119 28
49 C.F.R. 386 20
49 C.F.R. 386.72 20
49 C.F.R. 393.83 20
40 C.F.R. 1500.1(a) 5
40 C.F.R. 1500.1(c) 6
40 C.F.R. 1500-1508 ..... 1, 8, 26
40 C.F.R. 1501.3(a) 8
40 C.F.R. 1502.14(a) 9
40 C.F.R. 1502.14(f) 9
40 C.F.R. 1502.19(a) 10
40 C.F.R. 1506.3 10
40 C.F.R. 1508.13 ..... 9, 11, 13
40 C.F.R. 1508.18 ..... 8, 17
40 C.F.R. 1508.18(b)(1) 8
40 C.F.R. 1508.25(c) 9, 24, 25
40 C.F.R. 1508.27 ..... 9, 13
40 C.F.R. 1508.27(a) 13, 24, 25
40 C.F.R. 1508.5 10
40 C.F.R. 1508.7 ..... 9, 12, 24, 25
40 C.F.R. 1508.8(a) 9, 11
40 C.F.R. 1508.8(b) 11
40 C.F.R. 1508.9 8
40 C.F.R. 1508.9(a) 8
40 C.F.R. 1508.9(a)(1) 11
40 C.F.R. 1508.9(b) 8

Other Authorities

North American Free Trade Agreement, 32 I.L.M. 289 (1993) 7
115 Cong. Rec. 19,009 (1969) 6
115 Cong. Rec. 39,702 (1969) 21
68 Fed. Reg. 10,030 (March 3, 2003) 17
68 Fed. Reg. 70,586 (Dec. 18, 2003). 17
68 Fed. Reg. 9,595 (Feb. 28, 2003) 17
Daniel R. Mandelker, *NEPA Law and Litigation* (July 2003) 5

http://www.dot.gov/affairs/dot10702.htm (last visited Mar. 9, 2004) 12
S. Rep. No. 91-296 (1969) 5, 7, 24, 25

STATEMENT OF INTERESTS OF AMICI CURIAE[1]

Defenders of Wildlife is a nonprofit organization dedicated to the protection of native animals and plants in their natural communities. It focuses its actions on curtailing two of the most serious environmental threats to the planet: the accelerating rate of extinction of species, and habitat alteration and destruction. Defenders of Wildlife has thousands of members who live in and enjoy recreating in the border region of the United States.

Defenders of Wildlife also regularly relies on the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. 706(1), (2), and the requirements of the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.*, as well as the Council on Environmental Quality's binding regulations, 40 C.F.R. 1500-1508, in bringing cases in federal court to ensure compliance with laws enacted to protect the environment.

Environmental Defense (formerly the Environmental Defense Fund) is a national nonpartisan, nonprofit organization representing more than 400,000 members nationwide. Since 1967 Environmental Defense has linked science, economics, and law to create innovative, equitable, and cost-effective solutions to the most urgent environmental

---

[1] The parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of this Court. Pursuant to this Court's Rule 37.6, *amici* state that none of the parties or their counsel wrote the brief in whole or in part. In addition to *amici*, their members, and counsel, counsel for *amici* were principally assisted by the following students in the Stanford Law School Supreme Court Litigation Clinic and the Stanford Law School Environmental Law Clinic: William B. Adams, Brigham John Bowen, Eric J. Feigin, and Jennifer J. Thomas; clinic members David M. Cooper, Daniel S. Goldman, and Nicola J. Mrazek also participated. The Stanford Law School Supreme Court Litigation Clinic has covered the costs connected with the brief.

problems. Environmental Defense has helped design such landmark clean air programs as the market-based pollution cap and allowance trading program adopted in the 1990 Clean Air Act amendments to abate acid deposition. Consistent with its belief that economic prosperity and markets can be harnessed to protect public health and the environment, Environmental Defense supports the North American Free Trade Agreement and advocates associated public health and environmental protections. The case before this Court presents issues integrally related to Environmental Defense's core mission: protecting public health and the environment from harmful airborne contaminants.

Environmental Defense has appeared in this Court as amicus or party in many cases involving federal environmental statutes, including *Alaska v. EPA*, 124 S. Ct. 983 (2004); *Whitman v. American Trucking Associations*, 531 U.S. 457 (2001); *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001); *City of Chicago v. Environmental Defense Fund*, 511 U.S. 328 (1994); and *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978).

The Sierra Club is a national nonprofit organization of approximately 750,000 members dedicated to exploring, enjoying, and protecting the wild places of the earth; to practicing and promoting the responsible use of the earth's ecosystems and resources; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives. The Sierra Club's concerns encompass air pollution and public health. The Club's particular interest in this case and the issues that the case concerns stems from the threat it poses to informed agency decisionmaking.

SUMMARY OF ARGUMENT

The question posed by this case is whether the Federal Motor Carrier Safety Administration (FMCSA) can evade its

responsibility under this nation's environmental laws to consider the impact that increased foreign truck traffic will have on the environment. The government concedes, as it must, that the FMCSA is a federal agency subject to both the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.*, and the Clean Air Act (CAA), 42 U.S.C. 7401 *et seq.*, and that it must assess the environmental impacts of its safety regulations. The statutes, regulations, and consistent precedents of this Court and the courts of appeals show that those impacts include the effects on the environment, both locally and nationally, that will flow over time from a foreseeable change in the mix of trucks on the road, as older, more polluting Mexico-domiciled trucks are substituted for a domestic fleet that is becoming progressively cleaner due to Environmental Protection Agency rules governing new truck engines.

The FMCSA failed sufficiently to assess these impacts. It declined to prepare the thorough Environmental Impact Statement that NEPA requires because a deeply flawed, more preliminary analysis – an Environmental Assessment (EA) – led it mistakenly to conclude that its rules would not "significantly affect[] the quality of the human environment." 42 U.S.C. 4332(2)(C). Of the EA's many errors, the following three are particularly significant. First, the FMCSA concluded that it was not required to take into account the increased emissions produced by the Mexico-domiciled trucks because the only actual "effect" of its regulations would be the pollution caused by foreign trucks idling by the side of the road during individual safety inspections. Second, the EA's geographical frame of reference was insufficient: The FMCSA looked at the incremental effect of Mexico-domiciled trucks on the national level of pollutant emissions rather than evaluating, as NEPA requires, the trucks' impact on air quality in the areas where they are likely to be concentrated and where emissions are likely to occur. Third, its temporal frame of reference was too short: The FMCSA limited its analysis to a single year, now passed, and failed

entirely to analyze the long-term environmental effects of substituting Mexican for domestic carriers, even though the activity allowed by the FMCSA regulations can continue in perpetuity.

The FMCSA's separate refusal to perform a conformity review under the CAA was similarly flawed. That Act requires states to comply with national air quality standards. 42 U.S.C. 7410(a). To make sure that federal action will not interfere with a state's efforts to do so, the CAA forbids federal agencies from licensing, permitting, or approving any activity that does not conform to a state's implementation plan. *Id.* § 7506(c)(1).

The Environmental Protection Agency (EPA) has promulgated regulations governing federal agencies' duties with respect to conformity review. Under these regulations, an agency must ask whether the direct and indirect air quality effects of regulated pollutant emissions "caused by the Federal action" will equal or exceed regional threshold levels established by the EPA. 40 C.F.R. 93.152. Emissions from Mexico-domiciled trucks permitted by the FMCSA to travel beyond the border zone are "caused by" the FMCSA, because the emissions would not occur without agency-issued permits. *Id.* But the agency's reliance on its flawed Environmental Assessment led it to conclude that its actions would not create sufficient air quality effects to trigger conformity review. If the FMCSA had conducted proper NEPA and CAA conformity reviews, and if Mexico-domiciled trucks met emission standards comparable to U.S. standards, there would be no dispute in this case.

The agency's conclusion that the effects of its action were insignificant violates not simply the law and the regulations: It runs afoul of simple common sense. This Court should therefore affirm the judgment of the Ninth Circuit and require the FMCSA to comply fully with the requirements of NEPA and the CAA.

ARGUMENT

I. NEPA IS THE NATION'S BEDROCK ENVIRONMENTAL LAW AND APPLIES TO ALL MAJOR FEDERAL AGENCY ACTIONS

The National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, is "our basic national charter for protection of the environment." 40 C.F.R. 1500.1(a); *see also* Daniel R. Mandelker, *NEPA Law and Litigation* § 1.1 (July 2003) (referring to NEPA as "an environmental Magna Carta"). NEPA requires that "to the fullest extent possible . . . all agencies of the Federal Government shall . . . include in . . . major Federal actions significantly affecting the quality of the human environment, a detailed statement" addressing "the environmental impact of the proposed action, any adverse environmental impacts which cannot be avoided . . . alternatives to the proposed action," and other environmental issues. 42 U.S.C. 4332. It further requires that "the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth" therein. *Id.*

In enacting NEPA, Congress has demonstrated "a broad national commitment to protecting and promoting environmental quality." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989). NEPA mandates that environmental issues occupy the forefront of agency decisionmaking to ensure the development of "new means and procedures to preserve environmental values in the larger public interest, to coordinate Government activities that shape our future environment, and to provide guidance and incentives for State and local government and for private enterprise . . . ." S. Rep. No. 91-296, at 5 (1969). NEPA has "reorder[ed] national goals and priorities" so that our nation no longer exclusively emphasizes "the production of goods" or the "increase [of] gross national product." *Id.*

A. Congress Intended NEPA to Play a Central Role in Governmental Decisionmaking

Congress' purpose in enacting NEPA was not simply to state a precatory environmental policy, nor is NEPA an empty shell that federal agencies may circumvent or ignore at will. Far from merely announcing abstract principles, Congress "[made] environmental protection a part of the mandate of *every* federal agency and department." *Calvert Cliffs' Coordinating Committee, Inc. v. Atomic Energy Commission*, 449 F.2d 1109, 1112 (CADC 1971) (emphasis added). NEPA therefore requires federal agencies to take a "hard look at [the] environmental consequences" of their proposed actions. *Methow Valley*, 490 U.S. at 350 (quotation marks omitted). In so doing, NEPA makes certain "that environmental concerns will be integrated into the very process of agency decision-making." *Andrus v. Sierra Club*, 442 U.S. 347, 350 (1979).

This integration serves two primary purposes. First, "[i]t ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts." *Methow Valley*, 490 U.S. at 349. As the implementing regulations make clear, NEPA "is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment." 40 C.F.R. 1500.1(c). According to the principal Senate sponsor, NEPA creates a scheme that "administrators may refer to . . . for guidance in making decisions . . . [where] environmental values [are] in conflict with other values." 115 Cong. Rec. 19,009 (1969) (statement of Sen. Jackson).

Second, NEPA "guarantees that the relevant [environmental] information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision." *Methow Valley*, 490 U.S. at 349. As Congress

noted, NEPA ensures that federal agencies provide sufficient environmental information about the proposed action for "subsequent reviewers, both within the executive branch and in Congress, to consider." S. Rep. No. 91-296, at 21. By thoroughly collecting and analyzing this data, federal agencies educate not only themselves, but also other governmental actors and the public, about the environmental ramifications of their proposed action.

Contrary to the United States' intimations, *see* U.S. Br. 38 & n.16, 40, the ratification of the North American Free Trade Agreement (NAFTA), 32 I.L.M. 289 (1993), leaves untouched the environmental obligations that Congress created in NEPA. One of NAFTA's express purposes was to "STRENGTHEN the development and enforcement of environmental laws and regulations." NAFTA pmbl., 32 I.L.M. 289, 297 (1993). The Agreement specifically recognizes the power of the United States to "adopt, maintain or apply any standards-related measure, including any such measure relating to safety, the protection of human, animal or plant life or health, the environment or consumers." NAFTA art. 904(1), 32 I.L.M. at 387. Moreover, the North American Agreement on Environmental Cooperation, NAFTA's environmental side agreement, proclaims that one of its objectives is to "enhance compliance with, and enforcement of, environmental laws and regulations." NAAEC pmbl., 32 I.L.M. 1480, 1483 (1993). And by its plain terms, NAFTA's implementing statute sustains and protects the integrity of federal environmental laws: "Nothing in this Act shall be construed to amend or modify any law of the United States, including any law regarding . . . the protection of the environment." 19 U.S.C 3312(a)(2). These statements demonstrate that NEPA continues to apply even where a proposed agency action relates to the United States' obligations under NAFTA.

B. NEPA's Objectives are Achieved Through Full Consideration and Disclosure of the Environmental Impacts of Federal Agency Action

When it enacted NEPA, Congress also established the Council on Environmental Quality (CEQ), an executive body responsible for reviewing "the various programs and activities of the Federal Government in light of the policy set forth in [NEPA]." *Andrus*, 442 U.S. at 358 (citing 42 U.S.C. 4344(3)). The CEQ has issued regulations specifying agencies' obligations under NEPA, *see* 40 C.F.R. 1500-1508, and this Court has concluded that these regulations merit "substantial deference." *Andrus*, 442 U.S. at 358.

The CEQ regulations have clarified that NEPA applies to all actions that "are potentially subject to Federal control and responsibility." 40 C.F.R. 1508.18. Such actions include an agency's adoption of regulations. *Id.* § 1508.18(b)(1).

NEPA "supplement[s]" an agency's existing authority by requiring it to consider environmental implications even when its general policymaking authority is more limited. 40 C.F.R. 1500.6; *see also* 42 U.S.C. 4335; *Pacific Legal Foundation v. Andrus*, 657 F.2d 829, 835 (CA6 1981) ("NEPA supplements the existing goals of agencies and provides that agencies should also consider environmental concerns."). Unless a federal agency immediately determines that a full Environmental Impact Statement (EIS) will be necessary, 40 C.F.R. 1501.3(a), NEPA compliance begins with the preparation of an Environmental Assessment (EA) – a document meant to provide "sufficient evidence and analysis for determining whether to prepare an [EIS]." *Id.* § 1508.9(a). The regulations dictate that an EA must include a full and fair discussion "of the need for the proposal, of alternatives as required by [NEPA], of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted." *Id.* § 1508.9(b). Under certain carefully defined circumstances, the EA may lead to a

Finding of No Significant Impact (FONSI) rather than a full EIS. *See id.* § 1508.13.

A federal agency must prepare an EIS when an EA indicates that a proposed action may "significantly affect[] the quality of the human environment." 42 U.S.C. 4332(2)(C). This critical document must contain a detailed discussion of the "effects" of the agency's action. These include both "direct effects" that are "caused by the action and occur at the same time and place" and also "indirect effects" that are "later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. 1508.8(a), (b). The definition of "effects" also includes "cumulative effects," *id.* § 1508.25(c), which the regulations define as the "incremental impact of the action when added to other past, present, and reasonably foreseeable future actions *regardless of what agency (Federal or non-Federal) or person undertakes such other actions*." *Id.* § 1508.7 (emphasis added). In addition, the analysis must consider impacts on human health. *Id.* § 1508.8. In evaluating the significance of an action, agencies must analyze local, as well as national, impacts and must also consider "both short- and long-term effects." *Id.* § 1508.27. Further, the EIS must "[r]igorously explore and objectively evaluate all reasonable alternatives" to the agency's proposed action. *Id.* § 1502.14(a). This discussion must address "appropriate mitigation measures" that the agency could take to reduce the adverse environmental effects of its proposed action. *Id.* § 1502.14(f).

When a federal agency prepares an EIS, it does not do so simply for its own benefit. Intergovernmental cooperation is essential to allow "other government agencies to react to the effects of a proposed action at a meaningful time." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989). Thus, the CEQ regulations require federal agencies to circulate the EIS to "[a]ny Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved and any appropriate Federal, State or local agency authorized to develop and enforce

environmental standards." 40 C.F.R. 1502.19(a). Indeed, one of the main functions of the EIS preparation process is to solicit input from these expert agencies and to modify the environmental analysis accordingly. *Id.* Part 1503; *see also Methow Valley*, 490 U.S. at 350 ("[W]here the adverse effects on air quality . . . will be subject to regulation by other governmental bodies, the EIS serves the function of offering those bodies adequate notice of the expected consequences and the opportunity to plan and implement corrective measures in a timely manner."). In addition, the CEQ regulations contemplate that an EIS prepared by one agency for a particular decision also may be relied upon and used by other federal, state and local agencies with jurisdiction over one of the environmental impacts covered by the document. 40 C.F.R. 1506.3, 1508.5.

II. NEPA REQUIRED THE FMCSA TO PREPARE AN EIS CONSIDERING THE ENVIRONMENTAL EFFECTS ATTRIBUTABLE TO PERMITTING INCREASED MEXICAN CARRIER TRAFFIC BEYOND THE BORDER ZONE

NEPA expressly applies to "*all* agencies of the Federal Government," 42 U.S.C. 4332(2) (emphasis added). The government therefore concedes that the FMCSA "must apply NEPA." U.S. Br. 38 n.16. But the government seeks to sidestep the statute's requirements by offering an exceptionally cramped view of the obligations NEPA imposes. *See* U.S. Br. 24-42. Its position incorrectly interprets NEPA, its implementing regulations, and the prior decisions of this Court. All of these authorities indicate that the FMCSA was required to prepare an EIS assessing the environmental impacts of Mexican carrier operations beyond the border zone.

A. The FMCSA's EA Provided No Basis on Which to Issue a FONSI

The FMCSA's issuance of a FONSI in this case was "not in accordance with law." *Marsh*, 490 U.S. at 375 n.21 (quoting 5 U.S.C. 706(2)(A)). In all cases where an agency action falls under NEPA, an agency that does not opt simply to undertake an EIS at the outset must prepare an EA that "[b]riefly provide[s] *sufficient evidence and analysis* for determining whether to prepare an [EIS] or a [FONSI]," 40 C.F.R. 1508.9(a)(1) (emphasis added). In order for a FONSI to be justified in place of an EIS, the EA must show that the agency's action "will not have a significant effect on the human environment." *Id.* § 1508.13.

The EA prepared by the FMCSA in this case fails to provide "sufficient evidence and analysis" to support such a conclusion. In preparing its EA, the FMCSA simply ignored the CEQ's definitions of "significant" and "effect." A proper understanding of these terms demonstrates why the FMCSA's EA was entirely insufficient to support a FONSI.

1. An Increase in Mexico-Domiciled Truck Emissions Outside the Border Zone Is One Effect of the FMCSA's Actions

Because it is a "cumulative impact" of the FMCSA's promulgation of new safety rules, the travel of Mexico-domiciled trucks outside the border zone required environmental analysis.[2] The CEQ regulations define

[2] The trucks' movement also requires NEPA analysis as either a "direct" or "indirect" effect of the FMCSA's actions. 40 C.F.R. 1508.8. The trucks' operations are directly "caused by" the agency's issuance of operating authority. *Id.* § 1508.8(a) (defining direct effects); *see also infra* at II.B. The movement of the trucks is also a "reasonably foreseeable" result of the agency's promulgation of safety regulations. 40 C.F.R. 1508.8(b) (defining indirect effects); *see also infra* at 12.

"effects" under NEPA to include those "impacts" of an agency action that are "cumulative" in nature. 40 C.F.R. 1508.8. A "cumulative impact" is any "impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." *Id.* § 1508.7.

At the time the FMCSA prepared its EA in 2002, there was no Mexican carrier traffic beyond the border zone for two reasons. First, there was a trade moratorium on the "entry of motor carriers domiciled in a contiguous foreign country." Pet. App. 9a (quotation marks omitted). Second, the FMCSA could not process Mexican carriers' applications for permission to operate beyond the border zone because in December 2001 Congress forbade the FMCSA from spending any funds to process these applications until the FMCSA first promulgated new safety rules. Pub. L. No. 107-87, § 350, 115 Stat. 864 ("Section 350"). Though the moratorium was subsequently lifted in November 2002, U.S. Br. 2, Section 350 remains in effect. *See* Pub. L. No. 108-199, Div. F, Tit. I, § 130 (2004) (available on Westlaw at 2004 HR 2673).

The government concedes that the imminent lifting of the moratorium was "foreseeable" at the time the EA was prepared in January 2002. U.S. Br. 41. Anticipating this event, Mexican carriers began to submit applications to operate outside the border zone. *See* http://www.dot.gov/affairs/dot10702.htm (last visited Mar. 9, 2004). It was thus eminently foreseeable that if the FMCSA were to promulgate new safety regulations, some of the applications would be granted and Mexico-domiciled trucks would travel beyond the border zone. This foreseeable effect of the agency's actions required NEPA analysis. 40 C.F.R. 1508.7, .8.

2. The EA Failed to Analyze Whether Mexican Carrier Emissions Outside the Border Zone Will Have a "Significant" Impact on the Environment

The cursory and incomplete analysis contained within its EA did not support the FMCSA's determination that emissions from newly licensed Mexico-domiciled trucks would have "no significant effect on the human environment." J.A. 34. *Cf.* 40 C.F.R. 1508.13. The CEQ regulations mandate that "the significance of an action must be analyzed in *several contexts such as* society as a whole (human, national), *the affected region*, the affected interests, *and the locality*." 40 C.F.R. 1508.27(a) (emphases added). Moreover, when analyzing significance, "*both short- and long-term effects are relevant.*" *Id.* (emphasis added). The EA here failed to meet either requirement.

First, rather than analyzing the significance of increased Mexico-domiciled truck emissions in "several contexts," the EA analyzed them solely in one context: national. The EA merely stated, without more, that "[t]he changes in resulting emissions are negligible when compared to *national* levels of emissions for the operations of [commercial motor vehicles], all on-road sources, and total emissions from all sources." J.A. 167 (emphasis added). Omitted from the EA was any discussion of the impact upon the "affected region": the specific "localit[ies]" of the United States through which the Mexico-domiciled trucks will actually travel. 40 C.F.R. 1508.27(a). Obviously, many more Mexico-domiciled trucks will pass through Southern California than will enter Maine; consequently, Mexico-domiciled truck emissions will constitute a much higher percentage of emissions in Southern California than of emissions across the entire United States. Yet the FMCSA never bothered even to ask how the emissions would particularly impact specific areas.

Second, the EA neglected to analyze any "long-term effects" of the Mexican carrier emissions, instead focusing

solely on trucks "projected to operate in [Fiscal Year] 2002." J.A. 215-17, tbls. C-7 – C-9; *see also* J.A. 147 (stating that the data for the EA's air quality analysis appears in Appendix C). The new safety regulations were scheduled to take effect in May 2002. 67 Fed. Reg. 12,702 (Mar. 19, 2002). Since FY2002 ended on September 30, the EA considered only five months worth of emissions.

While it would be difficult under any circumstances to consider a five-month emissions analysis to be "long-term," that time frame was particularly inappropriate here. Not only did the EA fail to justify why future years would follow the same pattern as Fiscal Year 2002, but there was ample reason to believe that Fiscal Year 2002 was unrepresentative. First, *total* cross-border traffic will likely increase in the future due to an expansion in trade. While the EA admits that "the total amount of cargo transported from Mexico into the United States could increase *slightly*," J.A. 148 (emphasis added), it utterly neglects to justify *why* this effect would be so "slight" if it were properly considered over the course of several years. Second, the *relative* impact of Mexican carrier emissions compared to other emissions will likely also increase over time. Mexico-domiciled trucks, unlike their counterparts in the United States, are outside the jurisdiction of EPA engine emissions standards. By statutory mandate, these emissions standards can only grow stricter over time, *see* 42 U.S.C. 7521(b)(1)(C), and the EPA has promulgated new rules that will apply to engines beginning with model years 2004 and 2007. *See* 40 C.F.R. 86.004-11, 86.007-11. As a result, emissions from compliant domestic trucks will decrease, and emissions from noncompliant Mexico-domiciled trucks will constitute a progressively higher percentage of the overall pollution burden. The narrow, short-term time frame taken by the EA utterly ignores this critical difference in the current and future fleet mix for each nation.

B. The Government's Argument Rests on an Unsupportable Notion of Causation

Despite the fact that Section 350 prevents the authorization of Mexican carriers to operate beyond the border zone until the FMCSA issues new safety regulations, the government nevertheless contends that the moratorium modification is the sole cause for Mexico-domiciled trucks traveling beyond the border zone. U.S. Br. 30-42. Under the government's erroneous conception of causation, "the only increased emissions resulting from the [FMCSA] regulations" would be emissions caused by roadside safety inspections undertaken while processing Mexican carriers' applications. U.S. Br. 41. This argument misrepresents both NEPA and the law of causation.

1. The FMCSA's Actions Are a Legal Cause of Mexican Carriers Operating Outside the Border Zone

In asserting that the FMCSA is responsible for only inspection-related emissions, the government's argument ignores the NEPA causation framework that this Court articulated in *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983). *Metropolitan Edison* supplies a two-part analysis for the question of when NEPA requires "consideration of a particular effect." *Id.* at 773. It first asks what "change in the physical environment" is caused by the agency action in question. *Id.* It then requires the agency to assess the environmental impact of any effect with "a reasonably close causal relationship" to that change. *Id.* at 774.

In *Metropolitan Edison*, the Nuclear Regulatory Commission (NRC) caused a change in the physical environment by granting permission for the renewed operation of a nuclear power plant. 460 U.S. at 775. The Court therefore held that it was proper under NEPA for the

NRC to consider the following "direct effects" of granting that permission: increased radiation, fog, water discharge, and risk of a nuclear accident. *Id.* This Court has taken an identical approach to causation in other NEPA cases. *See, e.g., Marsh*, 490 U.S. at 363-65, 385 (finding that a change in the physical environment in constructing a dam would require an additional EIS if new and accurate information were available regarding impact upon fish population and soil quality); *Methow Valley*, 490 U.S. at 337-39, 350 (finding that a change in the physical environment by permitting development of ski resort required an EIS studying, *inter alia*, effects on regional air quality).

Like the regulatory actions in those cases, the promulgation of regulations that allow Mexico-domiciled trucks to operate beyond the border zone will cause a change in the physical environment: In this case, that effect will be increased foreign vehicle traffic. *Metropolitan Edison* thus requires the FMCSA to consider environmental effects with a "reasonably close causal relationship" to that change. 460 U.S. at 774. In the case of the Mexico-domiciled trucks, these effects of course include the emissions they create and the concomitant impact upon regional air quality.

In asserting that the FMCSA is responsible for only inspection-related emissions, the government draws an artificial line between the *process* of granting permission (the inspections) and the *result* that follows from granting that permission (the movement of the trucks). That reasoning ignores the fact that *Metropolitan Edison* itself involved an agency's grant of permission. This Court deemed Metropolitan Edison's restarting of the power plant to be a "change in the physical environment" caused by the NRC's grant of permission to do so. *Metropolitan Edison*, 460 U.S. at 773-75; *see also Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 106-107 (1983) (indicating that consideration of "significant health, socioeconomic, and cumulative consequences" of a power plant is appropriate when the NRC licenses its operation).

The CEQ regulations specifically mention "[a]pproval of specific projects" such as "by permit or other regulatory decision" in their definition of "major federal actions" subject to NEPA analysis. 40 C.F.R. 1508.18. As this Court has recognized in its prior cases, analyzing an action of this type would be meaningless unless there is consideration of what will happen after an agency grants permission for the private party's action.[3]

2. The Order Lifting the Moratorium Did Not Excuse the FMCSA from Its Obligations Under NEPA

The existence of the order lifting the moratorium in no way undermines the causal link between the FMCSA's regulations and the movement of the trucks. The FMCSA conceded as much when it admitted that, standing alone, a moratorium modification can have "no practical effect," since Section 350 prevents the FMCSA from processing any applications from Mexican carriers unless and until it promulgates new safety regulations. J.A. 58.

The government's argument obscures this fact by implying that the FMCSA's rulemaking is simply a

---

[3] Agencies routinely prepare an EIS when promulgating rules that regulate private parties, even though in such cases the private parties will provide the final link in a causal change affecting the environment. For example, the Federal Railroad Administration recently prepared an EIS for an interim final rule requiring private railroad companies to sound locomotive horns when a train approaches and enters a public highway-rail crossing. 68 Fed. Reg. 70,586, 70,662 (Dec. 18, 2003). Similarly, the Bureau of Land Management published notice of its intent to prepare an EIS to address the environmental effects of proposed amendments to regulations governing the issuance of grazing permits to private parties. 68 Fed. Reg. 10,030 (March 3, 2003). By the same token, the Nuclear Regulatory Commission recently indicated that it plans to prepare an EIS to assess the impact of new rules governing the disposition of solid materials that originate in private NRC-licensed facilities. 68 Fed. Reg. 9,595, 9,601-02 (Feb. 28, 2003).

component of the President's order. *See* U.S. Br. 31, 36. This contention ignores a crucial distinction: The regulations were promulgated pursuant to a *congressional* limitation on the agency's power to authorize Mexican carriers to serve points beyond the border zone, not pursuant to any presidential directive related to the moratorium. In fulfilling the congressional precondition established in Section 350, the FMCSA exercises independent control over the operation of Mexican carriers beyond the border zone. Not only must the FMCSA's regulations exist before a single truck is allowed to operate outside the border zone, but each and every truck that receives such permission must comply with those regulations.

It would subvert congressional intent to provide the FMCSA with an exemption from NEPA on the basis of a presidential order issued with regard to the United States' obligations under NAFTA. Congress has made clear that no such exemption is warranted. In NAFTA's implementing statute, Congress squarely stated that "[n]othing in this Act [implementing NAFTA] shall be construed to amend or modify any law of the United States, including any law regarding . . . the protection of the environment." 19 U.S.C. 3312(a)(2)(A). Congress was thus explicit that NAFTA does not in any way abrogate NEPA. Moreover, by enacting Section 350, Congress established an independent and integral role for the FMCSA in the NAFTA-compliant measure of licensing of Mexico-domiciled trucks to operate outside the border zone. By making this activity subject to agency action, Congress brought it squarely within the ambit of NEPA.

III. REQUIRING THE FMCSA TO PREPARE AN EIS SERVES THE IMPORTANT PURPOSES UNDERLYING NEPA

Requiring the FMCSA to prepare an EIS in this case would serve the critical purposes of NEPA. First, an EIS enables better rulemaking by the FMCSA itself with respect

to the operation of Mexico-domiciled trucks beyond the border zone. *See Methow Valley*, 490 U.S. at 349 (explaining that one purpose of NEPA is to provide information to an agency's decisionmakers about the environmental ramifications of their proposed actions). Second, the EIS educates both other governmental actors and the public by providing them with environmental information about the proposed action. *See id.* Here, the preparation of an EIS that evaluates and discloses the direct, indirect and cumulative environmental effects of regulations permitting Mexico-domiciled trucks beyond the border zone is critical to informed decisionmaking and to an informed public.

A. The EIS Would Enable the FMCSA to Choose Among Alternative Safety Regulations

The FMCSA could use the comprehensive environmental information contained in an EIS to craft specific safety regulations that have the secondary effect of reducing the environmental impact, including adverse health effects, from Mexican carriers. Thus, it is illogical for the government to claim that an EIS would serve "no purpose" in this case. U.S. Br. 38. By undergoing proper NEPA review, the FMCSA would ensure that, "in reaching its decision, [it] will have available, and will carefully consider, detailed information concerning significant environmental impacts." *Methow Valley*, 490 U.S. at 349. Without such analysis, the agency cannot guarantee "that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast." *Id.*

1. The FMCSA's Mandate Incorporates Environmental Issues

The government's claim that the FMCSA need not prepare an EIS because the agency's mandate is limited to safety issues, *see* U.S. Br. 25-27, 32-33, 35-36, is unsound.

This characterization is legally untenable because NEPA provides *all* federal agencies with the supplemental authority to consider the environmental effects of their decisionmaking. *See* 42 U.S.C. 4335.

Moreover, the government's claim is factually erroneous because the FMCSA does exercise authority over multiple areas relating to the environment. For example, the FMCSA bears primary responsibility for enforcing regulations relating to the transportation of hazardous materials throughout the United States. *See* 49 U.S.C. 113(f) (delegating the FMSCA authority over 49 U.S.C. 5101 *et seq.* and 49 U.S.C. 3100 *et seq.*); 49 C.F.R. 386 (describing administrative enforcement proceedings for, *inter alia*, violations of regulations governing the transportation of hazardous materials found in 49 C.F.R. 171-80). Surely, the FMCSA must consider environmental issues when enforcing rules relating to the transportation and storage of highly toxic materials, as spills can harm both human life and the ecosystem. In fact, the agency's statutory mandate requires that it establish "minimum levels of financial responsibility" for motor vehicles to cover "public liability, property damage, and *environmental* restoration" during the interstate transportation of hazardous materials. 49 U.S.C. 31139(c)(1) (emphasis added). And the FMCSA's regulations permit it to seek an injunction in federal court to prevent the transportation of hazardous materials where the situation "presents a substantial likelihood that . . . substantial endangerment to health, property, or the *environment* may occur before" a formal administrative proceeding can commence. 49 C.F.R. 386.72 (emphasis added).

Similarly, to ensure commercial motor vehicle safety, the FMCSA regulates vehicle exhaust, *see* 49 C.F.R. 393.83, which can harm the operator, public health, and the environment. Additionally, the FMSCA has statutory authority to assist in developing a national intermodal transportation system that, among other things, is "economically efficient and *environmentally* sound." 49

U.S.C. 5501(a) (emphasis added). Since aspects of the FMCSA's mandate have an environmental focus, the agency's mission cannot be as narrow as the government insists.

Congress drafted NEPA in broad terms, directing that all federal agencies should comply with NEPA "to the fullest extent possible." 42 U.S.C. 4332. It expressly directed that "no agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance." 115 Cong. Rec. 39,702, 39,703 (1969) (statement of House conferees); *see also Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (CADC), *cert. denied* 502 U.S. 994 (1991) ("[A]n agency may not define the objectives of its action in terms so unreasonably narrow . . . [that] the EIS becomes a foreordained formality."). But that is exactly what the government has done by portraying, albeit incorrectly, the FMCSA as simply a safety agency with respect to which environmental issues cannot enter the decisionmaking process.

2. The FMCSA Has Discretion to Choose Environmentally Protective Alternatives When Issuing Regulations

The government again attempts to avoid the force of its concession that NEPA applies to the FMCSA's rulemaking by claiming that the FMCSA's actions are purely ministerial and that, therefore, an EIS would not further NEPA's aim to influence agency decisionmaking. U.S. Br. 38-39. While it may be true that the FMCSA must grant authorization to all motor carriers that are "willing and able to comply with" its regulations, *see* 49 U.S.C. 13902(a)(1), and while it is certainly true that the FMCSA "did not have the discretion to countermand any determination by the President that Mexican carriers would no longer be barred," U.S. Br. 39, those observations are beside the point. The FMCSA will exercise discretion and independent judgment in determining (1)

whether to promulgate regulations at all, and, if so, (2) the precise content of those regulations. Neither in Section 350 nor anywhere else has Congress constrained the agency's discretion over these matters.

Both within the agency proceedings and during this litigation, the United States has repeatedly recognized a correlation between safety and environmental concerns when regulating Mexico-domiciled trucks. As the FMCSA's EA candidly explains, the agency "expects to target the highest risk [trucks] and bring them into compliance with United States safety and *environmental* laws, standards, policies, rules, and regulations." J.A. 193 (emphasis added). Further, the FMCSA stated in the court of appeals that its safety regulations would disproportionately affect older (pre-1993) Mexican trucks. J.A. 484. These are exactly the subset of trucks that release the most emissions. The stricter the safety regulations the agency chooses, the less pollution there will be from Mexico-domiciled trucks that travel outside the border zone.

The FMCSA is not constrained by its governing statute or any other law from considering this acknowledged correlation between safety and environmental protection in choosing among regulatory alternatives presented in a comprehensive EIS. For instance, the FMCSA or another agency charged with regulating the transportation of hazardous materials like the Research and Special Programs Administration of the Department of Transportation, *see* 49 U.S.C. 112; 49 C.F.R. 171-80, could use data from a properly conducted EIS to determine whether additional safety regulations are necessary for Mexico-domiciled trucks that carry hazardous materials, whether special routes for such trucks should be developed, or whether increased administrative enforcement may be necessary. With more comprehensive environmental information from the EIS, the FMCSA could possibly avert safety and environmental catastrophes through affirmative decisionmaking at the front end, just as NEPA intends.

Since the FMCSA retains non-ministerial discretion to regulate Mexico-domiciled trucks traveling beyond the border zone, under NEPA the agency "is not only permitted, but compelled, to take environmental values into account." *Calvert Cliffs*, 449 F.2d at 1112.

B. The EIS Would Provide Important Information to the Public, to Congress, and to the President

In addition to providing information for the FMCSA, NEPA's EIS requirement serves broader informational purposes. First, NEPA review provides valuable information to the public, both informing it about the environmental effects of government action and verifying that the government has taken those effects into account in making its decisions. *See Methow Valley*, 490 U.S. at 349 (recognizing that the publication of an EIS "provides a springboard for public comment"); *Baltimore Gas*, 462 U.S. at 97 (stating that NEPA "ensures that the agency will inform the public that it has indeed considered environmental concerns"); *Grand Canyon Trust v. Fed. Aviation Admin.*, 290 F.3d 339, 342 (CADC 2002) (noting an EA's purpose of providing relevant information regarding the cumulative effects of multiple actions to the public). Providing information to the public also encourages public involvement in and response to agency decisionmaking. *See Dubois v. United States Dep't of Agric.*, 102 F.3d 1273, 1285-86 (CA1 1996), *cert. denied sub nom. Loon Mountain Recreation Corp. v. Dubois*, 521 U.S. 1119 (1997) (taking note of NEPA's purpose of informing the public and allowing the public to "offer its insight to assist the agency's decision-making"); *Natural Resources Defense Council, Inc. v. Hodel*, 865 F.2d 288, 296 (CADC 1988) (enunciating NEPA's purpose of informing "the general public about the environmental consequences of a certain action in order to spur all interested parties to rethink the wisdom of the action").

Second, NEPA provides both Congress and the President with valuable information. *See Hodel*, 865 F.2d at 296 (declaring that the purpose of NEPA includes informing non-acting agencies and Congress and noting an EIS's value as "environmental source material" for Congress and the executive); *Comm. for Nuclear Responsibility, Inc. v. Seaborg*, 463 F.2d 783, 787 (CADC 1971) (noting informational value of NEPA statements for Congress and the President, "who has broad concern even when not directly involved"); *see also* S. Rep. No. 91-296, at 21.

The FMCSA's failure to prepare an EIS in this case has subverted the informational and disclosure objectives that lie at the heart of NEPA. Neither the agency decisionmakers nor the "larger audience" that NEPA was intended to serve, *see Methow Valley*, 490 U.S. at 350, have been provided with the environmental analysis necessary to make an informed choice among alternatives. As a result, neither Congress, nor the President, nor the public have been informed of the environmental effects that will be wrought by the impending influx of Mexico-domiciled trucks beyond the border zone.

C. The EIS Would Assist States in Meeting Their Obligations Under the Clean Air Act

The FMCSA's failure to comply with NEPA also frustrates NEPA's central purpose of enabling "other government agencies to react to the effects of a proposed action at a meaningful time." *Marsh*, 490 U.S. at 371. By requiring that agencies consider the long-term direct, indirect, and cumulative effects of their actions, *see* 40 C.F.R. 1508.7, .8, .25(c), .27(a), NEPA provides other governmental entities with "the opportunity to plan and implement corrective measures in a timely manner." *Methow Valley*, 490 U.S. at 350 (noting that the analysis of private off-site development activities in an EIS prepared by the Forest Service serves a notice and planning function for agencies regulating air quality and wildlife conservation).

The need to give notice to other governmental bodies is nowhere more keenly felt than in the context of states' obligations under the CAA. State air quality programs must account for and accommodate all actions affecting state air quality standards. *See* 42 U.S.C. 7407. Regions that already suffer from grave air pollution problems run the serious risk of losing federal transportation funding if the influx of pollution from Mexico-domiciled trucks prevents states from creating transportation plans that comply with CAA requirements. Information provided by NEPA review is essential to enable state and regional agencies to fulfill their CAA obligations. Such data afford states the opportunity to "implement corrective measures" before the impacts of those actions are felt. *Methow Valley*, 490 U.S. at 350.

Contrary to the government's claims, a full EIS in this case would serve NEPA's central goals. The FMCSA's failure to prepare an EIS that adequately reviews the local pollution impacts of increased Mexican truck traffic beyond the border zone has left states whose air quality will unquestionably be affected by this influx without any of the "relevant environmental information" they require to meet their attainment obligations under the CAA. *Methow Valley*, 490 U.S. at 350. These states lack data regarding the "expected consequences" of both direct agency actions and foreseeable nonagency actions, which is the very information NEPA was created to provide. *See id.*; *see also* 40 C.F.R. 1508.7, .8, .25(c), .27(a). Moreover, since applications by Mexican carriers to operate outside the border zone are regulated solely by the FMCSA, the environmental impacts of granting these applications might not be measured or considered at all unless the FMCSA completes an adequate EIS. NEPA was enacted precisely to prevent such a result. *See* 42 U.S.C. 4332; S. Rep. No. 91-296, at 5-9.

IV. THE FMCSA'S FAILURE TO PERFORM A CONFORMITY REVIEW VIOLATED THE CLEAN AIR ACT

Not only did the FMCSA fail adequately to perform its obligations under NEPA, but it also failed to meet its distinct "conformity review" obligations under the CAA. These obligations are wholly separate from the agency's obligations under NEPA. NEPA review is governed by the CEQ regulations, *see* 40 C.F.R. 1500 *et seq.*, while CAA conformity analysis is performed under regulations and standards promulgated by the EPA. *See* 42 U.S.C. 7506, 7509, 7510; 40 C.F.R. 93.150-.160. Thus, even if the Court were to find that no EIS was required in this case, the court below nevertheless correctly held that the FMCSA failed to comply with the separate conformity review provisions of the CAA.

Under the CAA, all federal agencies carry an "affirmative responsibility" to perform a "conformity analysis" of the air pollution impacts from direct and indirect emissions caused by agency action. 42 U.S.C. 7506; 40 C.F.R. 93.152, .154. In promulgating its safety regulations, the FMCSA relied on a flawed EA to conclude that its actions would not create sufficient air quality effects to trigger conformity review. J.A. 146-67. The FMCSA assessment erred in two respects: it failed to analyze those impacts by region, and it failed to analyze the proper range of actions and impacts on air quality.

First, the FMCSA was required to review emissions impacts on a regional basis. The CAA measures air quality control regionally, and all measurements of attainment or nonattainment must be taken accordingly. *See* 42 U.S.C. 7407(a) (requiring attainment of air quality standards "within each air quality control region"). Conformity analyses must do the same. *See, e.g.*, 40 C.F.R. 93.152 (defining prohibited federal actions as those that cause CAA violations at "location[s] in a nonattainment or maintenance area"); *id.* § 93.153(b) ("[C]onformity determination is required for each

pollutant . . . in a nonattainment or maintenance area."). The FMCSA failed to conduct such an analysis, opting instead to analyze emissions impacts on a national scale. J.A. 147, 167. Tellingly, the government's brief fails to address this requirement at all. Rather, it merely points to the potential "delay[]" to the President's "effort" to comply with NAFTA that proper conformity analysis might cause. U.S. Br. 47. Given that NAFTA in no way alters the requirements of the CAA, *see* 19 U.S.C. 3312, the government's non-answer cannot avoid the inescapable conclusion that the FMCSA's failure to analyze emissions impact on a regional basis violates its CAA conformity obligations.

Second, the FMCSA had to analyze a broader scope of emissions than it considered in its air quality analysis. EPA regulations require that federal agencies conduct conformity review when the sum of direct and indirect emissions "caused by the Federal action" will equal or exceed regional threshold levels established by EPA. 40 C.F.R. 93.152. The regulations further define "caused by" to mean "emissions that would not otherwise occur in the absence of the Federal action." *Id.* Thus, an emission that would not occur absent the action in question, regardless of other actions or causes for those emissions, is "caused by" the action for purposes of CAA conformity review. Under this regulatory scheme, any emissions created by Mexico-domiciled trucks operating beyond the border zone are "caused by" the FMCSA's promulgation of safety regulations, since without those regulations, no such truck traffic would occur. *See supra* at 12.

The EPA's definition of "indirect emissions" likewise compels the FMCSA to analyze Mexican carrier emissions more broadly. An agency must consider emissions "caused by" the Federal action when the agency "can practicably control and will maintain control over [the emissions] due to a continuing program responsibility of the Federal agency." 40 C.F.R. 93.152. Through its permitting responsibilities, inspections, audits, and other compliance programs, the

FMCSA both can and will maintain control over Mexican carriers traveling beyond the border zone. *See* 49 C.F.R. 385.103 (establishing a "safety monitoring system" with "frequent roadside inspections" and a safety audit program for Mexico-domiciled trucks). This control will extend through an eighteen-month compliance period established for each Mexican carrier and thereafter through ongoing general regulation by the FMCSA. *Id.*; *see also id.* § 385.119. The government's representations to the contrary, U.S. Br. 46, are therefore incorrect.

CONCLUSION

For the foregoing reasons, the judgment should be affirmed.

Respectfully submitted,

Kara Gillon
Defenders of Wildlife
824 Gold SW
Albuquerque, NM 87102

Pamela S. Karlan
(Counsel of Record)
Deborah A. Sivas
559 Nathan Abbott Way
Stanford, CA 94305
(650) 725-4851

Janea Ashanti Scott
Environmental Defense
257 Park Avenue South
17th Floor
New York, NY 10010

Sanjay Narayan
Sierra Club Environmental
Law Program
85 Second St., Second Floor
San Francisco, CA 94105

March 11, 2004